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Nos. 94-1620 and 94-1621

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN, PRESIDENT, UNIVERSITY OF MARYLAND AT COLLEGE PARK, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

MONICA GREENE, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether respondent was entitled to summary judgment on his equal protection challenge to a merit-based scholarship program for black students established by the University of Maryland, College Park, to remedy the current effects of its past *de jure* racial segregation and other racially discriminatory practices.

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INTEREST OF THE UNITED STATES

This case concerns the constitutional validity of the Benjamin Banneker Scholarship Program (Banneker program), a scholarship program established for black students by the University of Maryland, College Park (UMCP). The Banneker program was included in the system-wide desegregation plan submitted by the University to the United States Department of Education, Office for Civil Rights (OCR), in 1985 in an attempt to remedy the continuing effects of its past discrimination. The University once served as the all-white flagship institution in the Maryland

higher education system, a system that was segregated as a matter of law until the mid 1950s, and as a matter of practice until the late 1970s. The court of appeals ruled that the Banneker program was unconstitutional.

The United States Department of Education has primary responsibility for the administrative enforcement of civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance such as UMCP. OCR has played an active role since 1969 in federal efforts to eliminate the vestiges of Maryland's past lawfully mandated racial segregation in higher education.

The United States notified UMCP in 1969 that its higher education system remained segregated and that it had a legal responsibility to dismantle that segregated system. During the subsequent 16 years, OCR and the State of Maryland worked together, sometimes amicably and other times adversarily, to formulate a system-wide desegregation plan. The plan that was finally adopted in 1985 included efforts, like the Banneker program, to recruit students of other races to attend formerly all-black and all-white institutions. The United States participated in this case in the district court and the court of appeals as amicus curiae in support of the constitutionality of the Banneker scholarship program.

The United States Department of Justice is currently involved in litigation concerning desegregation of systems of higher education in Mississippi, Louisiana, and Alabama. Those cases arose upon referral from the Department of Education after the States refused to comply voluntarily with Title VI. See 42 U.S.C. 2000d-1. A recently entered consent decree in the Louisiana case contains provisions requiring the State to establish race-targeted scholarships as one means of meeting its obligation to desegregate its system of higher education. The Department of Education has long-standing regulations interpreting Title VI. See 34 C.F.R. Pt. 100. It also

recently issued a policy guidance on the application of Title VI to race-targeted student financial aid. See 59 Fed. Reg. 8756-8764 (1994). The United States has an interest in the availability of minority-targeted financial aid as one permissible means to remedy past unconstitutional discrimination by state colleges and universities; it also has an interest in the development of appropriate legal standards for evaluating such remedies.

STATEMENT

1. This case is a challenge to a scholarship program for black students at the University of Maryland, College Park (UMCP), that was part of UMCP's plan to eliminate the lasting vestiges of its past unconstitutional discrimination against blacks. UMCP has a long history of intentional racial discrimination. Throughout the first half of this century, UMCP was mandated by state law to be an all-white institution as part of the *de jure* racial segregation of the Maryland higher education system. Black students could attend only the four all-black colleges in the State, colleges that were "vastly underfunded and consistently neglected." Pet. App. 36a, 99a & n.3. When there was pressure to address the inequities of the racially segregated system in order to comply with the separate-but-equal rule of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), Maryland chose instead to pay for blacks to leave the State to attend graduate school rather than to integrate or equalize its own institutions. Interv. Summ. J. Mot. Exh. 5, at 93-95. In 1949, the President of UMCP recommended that UMCP be privatized rather than allow black graduate students to enroll there. Pet. App. 37a-38a.

After this Court ruled that graduate schools in two other States were required to admit blacks (see *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)), UMCP admitted its first black graduate student in 1951. Pet. App. 38a. University of Maryland officials,

however, did not vote to remove the legal bar to black enrollment until after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Pet. App. 38a. The racial segregation of the system continued for approximately 20 years thereafter. *Id.* at 11a. During this period, UMCP effectively excluded black students from the all-white school by establishing new and more stringent admission standards, requiring standardized testing, resisting dormitory integration, preserving the all-white character of UMCP by considering only other all-white schools for inclusion in an expansion plan, and by taking no steps to recruit black students or to integrate its campus. *Id.* at 38a-40a. In 1969, UMCP remained 99% white. *Id.* at 40a.

In 1968, the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (the predecessor of the Department of Education) began its efforts to compel Maryland to desegregate its higher education system. OCR found that the Maryland higher education system remained racially segregated and informed Maryland of its duty to dismantle the system in order to meet its obligations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 41a. During the course of the next several years, Maryland submitted desegregation plans that OCR rejected as ineffectual. Maryland continued to neglect black students, including failing to increase financial aid expenditures to meet needs of black students from low or moderate income families or to provide adequate housing for blacks, and demonstrated continued hostility toward recruitment of black students. *Id.* at 41a-44a. After OCR accepted a desegregation plan in 1974, Maryland "repeatedly failed to act in a manner which would indicate that it [was] executing the Plan promptly and vigorously." *Id.* at 45a.

OCR advised Maryland in 1975 that it was preparing to commence formal enforcement proceedings. In response, Maryland obtained an injunction ordering OCR to seek voluntary compliance before it initiated enforce-

ment proceedings. See Pet. App. 111a; *Mandel* v. *HEW*, 411 F. Supp. 542, 550 (D. Md. 1976), aff'd by equally divided court *sub nom. Mayor of Baltimore* v. *Mathews*, 571 F.2d 1273 (4th Cir.) (en banc), cert. denied, 439 U.S. 862 (1978). Ultimately, after years of negotiation and litigation during which the State continued to take actions that hindered desegregation (see Pet. App. 46a-47a), Maryland submitted a desegregation plan for 1980-1984. OCR found the plan inadequate, analyzed the deficiencies and provided guidance regarding the steps necessary to bring Maryland into full compliance with Title VI. *Id.* at 46a. OCR specified that Maryland needed to address the disparity between the black and white rates of admission at the traditionally all-white institutions, including UMCP.

Maryland submitted another plan for 1985-1989, one component of which was the provision of "other-race" financial aid at both traditionally white and traditionally black institutions to attract students of other races to those institutions and thereby reduce their continuing racial identifiability, a vestige of the *de jure* segregated system. Pet. App. 47a-49a. As required by OCR, UMCP submitted a separate institutional plan which included the Benjamin Banneker Scholarship Program as one of the means by which UMCP intended to reduce its racial identifiability as an all-white institution. *Id.* at 48a-49a, 111a-112a. The Banneker program, established in 1978 as part of Maryland's effort to achieve Title VI compliance, provided merit-based scholarships to minority students at UMCP. *Id.* at 111a, 127a-128a & n.10. In response to UMCP's plan, OCR recommended increased recruitment efforts and an increase in the number and amount of merit-based scholarships for black students. *Id.* at 127a n.10. OCR accepted Maryland's 1985-1989 plan as "compliance with Title VI for the life of the plan." *Id.* at 48a. Maryland indicated that it intended to continue to follow the plan at least until completion of the OCR review. *Id.* at 48a-49a. From 1985 to 1989, Mary-

land provided more than $7,900,000 worth of "other-race" financial assistance to students pursuant to the plan, approximately $2,400,000 at historically black schools and $5,500,000 at other institutions. See Gov't D. Ct. Br., App. C.

Based upon its experience with the Banneker program during the preceding ten years and an evaluation of its effectiveness, Maryland refined the program in 1988 by increasing the amount of assistance to full four-year scholarships for tuition, room and board; at the same time it narrowed the eligible applicant pool to black students. Pet. App. 47a-48a & n.41, 98a-99a. UMCP did not set an exact number of Banneker scholarships to be awarded, although its practice was to award at least 20 Banneker scholarships annually. *Id.* at 48a, 98a, 132a. Nonetheless, the Banneker program accounted for only approximately one percent of UMCP's annual financial aid budget. *Id.* at 35a-36a, 87a & n.76.

All students, irrespective of race, could compete for scholarships with identical benefits under Maryland's Francis Scott Key Scholars Program (Key program), which awarded approximately twice as many scholarships as the Banneker program. Pet. App. 5a, 83a, 99a n.2.[1] The academic credentials required to be eligible for the Key program were somewhat more rigorous than the Banneker program. *Ibid.* In 1990, the year respondent entered UMCP, black students received two of the 52 Key scholarships awarded. *Id.* at 83a.

Only since the late 1980s has Maryland made "any genuine progress towards eliminating its single race status"; this progress has been the result in part of the Banneker program. Pet. App. 49a, 130a.[2] When this suit was

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[1] Respondent also challenged the validity of the Key program but the court rejected that challenge, Pet. App. 134a-137a, and respondent no longer pursues that claim.

[2] The district court noted that it took UMCP "from 1975 to 1983 to increase its black enrollment from 6.8% to 8.1%. Later in the

filed in 1990, the UMCP student population was 11.2% black. *Ibid.* OCR currently is in the process of determining whether Maryland's implementation of its system-wide desegregation plan has eliminated the vestiges of the *de jure* system of racial discrimination in accordance with the standard set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992). Pet. App. 48a, 111a.

At the time he filed this lawsuit in 1990, respondent was a 19-year-old male of Hispanic descent who had been granted admission to UMCP in 1989 to enter as part of the freshman class in the fall of 1990. He was found to be ineligible to receive a Banneker scholarship because he is not black. Pet. App. 99a. He was not eligible for a Key scholarship because he did not have adequate academic credentials. *Id.* at 5a, 134a. Respondent filed this lawsuit against UMCP, alleging that the Banneker scholarship program violated, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. Pet. App. 97a.

2. The district court examined the Banneker program to determine whether it survived a strict scrutiny analysis under the Equal Protection Clause.[3] The court entered summary judgment for defendants based on its conclusion that there was a strong basis in evidence that remedial action was necessary in light of the administrative findings of OCR and that the program served a compelling government interest and was narrowly tailored to achieve that goal. Pet. App. 109a-137a.

3. The court of appeals reversed, concluding that the district court needed to make specific findings about whether there was a sufficient present effect of UMCP's

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decade, the same 1.3% increase took only two years—between 1988 and 1990 the percentage of black undergraduates increased from 9.9% to 11.2%." Pet. App. 49a n.44.

[3] The court noted that Title VI standards are coextensive with those of the Fourteenth Amendment. Pet. App. 121a; see also *Fordice*, 112 S. Ct. at 2738 n.7 ("the reach of Title VI's protection extends no further than the Fourteenth Amendment").

past racial discrimination against blacks to justify maintenance of the race-based Banneker scholarship program. Pet. App. 96a-108a.

4. On remand, several black students at UMCP who had received Banneker scholarships and their parents were permitted to intervene as defendants. Pet. App. 35a n.2. UMCP conducted an extensive administrative review of the Banneker program to determine whether to continue the program and invited participation in that review by all parties to the litigation. In a 1993 Decision and Report (*reproduced at* Pet. App. 139a-220a), UMCP concluded that "the Banneker Program is a highly effective means for countering significant lingering effects of the University's historical identity as a discriminatory institution." *Id.* at 220a. It found that the program "also supports the University's efforts to create and sustain the diverse campus community identified as essential to providing a high-quality education." *Ibid.* UMCP concluded that continuing effects of the racially discriminatory dual system persisted at UMCP and influenced enrollment decisions of black students and that the Banneker Program was necessary to remedy those continuing effects.

The district court allowed additional discovery, received cross-motions for summary judgment based on extensive evidence including the 1993 University report, and made detailed factual findings. The court ruled that UMCP had presented a strong evidentiary basis showing four present effects of past racial discrimination: (1) UMCP has a poor reputation within the African-American community, particularly among parents and counselors who influence students' college choices; (2) African-Americans are underrepresented in the UMCP student population; (3) African-American students at UMCP have low retention and graduation rates; and (4) the UMCP campus atmosphere is perceived as hostile to African-American students. Pet. App. 50a-81a. The court cited evidence of, for example, first-hand accounts of current students who were urged not to attend UMCP because of its racially discrim-

inatory environment; statistical evidence of underrepresentation and attrition rates; and survey evidence regarding racially hostile campus environment, including, for example, separate homecomings for whites and blacks. The court concluded that remedial action to redress the prior racial discrimination remained necessary at the time respondent applied for a scholarship and that the Banneker program was narrowly tailored to remedy the effects. *Id.* at 81a-89a. The court entered summary judgment for petitioners and denied respondent's summary judgment motion.

5. The court of appeals reversed the district court's grant of summary judgment for petitioners and ordered that summary judgment be entered for respondent. The court ruled that, because the Banneker scholarship program excluded other races, UMCP was "burdened with a presumption" that the program could not be sustained. Pet. App. 6a. It held that, in order for present effects of discrimination to justify the program, petitioners had to "prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." *Id.* at 9a.

The court of appeals concluded that two of the present effects of past discrimination found by the district court—UMCP's poor reputation in the African-American community and the racially hostile campus environment—were not sufficient to justify the Banneker program. Pet. App. 10a. It believed that the poor reputation constituted "mere knowledge of historical fact[s]" of UMCP's prior discrimination and that is "not the kind of present effect that can justify a race-exclusive remedy." *Ibid.* The court rejected the district court's conclusion that the racially hostile UMCP campus environment was connected to UMCP's past discrimination. It reasoned that the incidents "do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." *Id.* at 11a.

With regard to the remaining two effects relied upon by the district court, the court of appeals held that they also could not justify the district court's decision. As for the district court's findings of strong evidence of low retention and graduation rates among African-Americans, the court of appeals ruled that genuine issues existed, including dispute as to the reason why African-Americans leave UMCP in greater numbers than other students. Pet. App. 14a. With regard to underrepresentation of African-Americans among entering students, the court believed there were remaining factual disputes about UMCP's minimum admission criteria and the relevant applicant pool. *Id.* at 15a-18a.

Rather than remanding the case to the district court for trial to resolve those factual disputes, the court of appeals ordered that summary judgment be granted to respondent. The court ruled that, even assuming the validity of the proffered justifications of racial underrepresentation and higher attrition rates related to past discrimination, the Banneker program was unlawful because it was not narrowly tailored to remedy those two effects. The court noted that the narrowly tailored determination was difficult to make because "the proof of present effects is so weak." Pet. App. 19a. The court found that the Banneker program effectively recruited only high-achieving African-Americans and high achievers were not the group against which UMCP had discriminated in the past. *Id.* at 20a. The court also ruled that because Banneker scholarship recipients included African-Americans who are not residents of the State of Maryland, the program was not narrowly tailored to the identified problem of not enough qualified African-American Maryland residents attending UMCP. The court found that UMCP's underrepresentation statistics failed to account for various factors and therefore led more to racial balancing than to a tailored remedy program. *Id.* at 25a. The court also found that

UMCP had not shown that it had tried any race-neutral solutions to address the retention problem. The court of appeals ordered that, on remand, the district court enter an order denying petitioners' summary judgment motion, grant respondent's summary judgment motion, and re-examine respondent's scholarship eligibility. *Id.* at 28a-29a.

In considering timely rehearing petitions, the court of appeals modified its opinion in one minor respect and denied rehearing en banc over the dissent of three judges.

DISCUSSION

The ruling in this case severely impedes the ongoing efforts of the United States Department of Education's Office for Civil Rights (OCR) to eliminate the vestiges of *de jure* segregation in state systems of higher education subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The court of appeals held that a state institution with a long and undisputed history of both *de jure* racial segregation and intentional racial discrimination may not implement, as part of an OCR-approved desegregation plan, a scholarship program to recruit and retain black students. In reaching this decision, the court of appeals incorrectly presumed that the program was invalid unless the University of Maryland, College Park (UMCP), could prove that the current racial disparities related solely to its own past discrimination, disregarded the presumption that the racial disparities in formerly *de jure* segregated education systems are related to that past segregation until proven otherwise, ignored the fact that UMCP's creation of the program was prompted by OCR's finding that it was in violation of Title VI and insistence that it take this type of remedial action, and overlooked the narrowly tailored features of the program. If left unreviewed, the decision will cause substantial confusion regarding the legal and constitutional standards

applicable to scholarship programs established by institutions attempting to remedy racial discrimination, and will also create doubt about the validity of the Department of Education's current policy guidance regarding such scholarships.

1. The court of appeals' opinion is inconsistent with the principle, recently reaffirmed by the Court in *United States* v. *Fordice*, 112 S. Ct. 2727, 2732, 2736-2737 (1992), that States that operated *de jure* racially segregated school systems have an affirmative duty to dismantle the systems and their vestiges. Under the Court's precedents, the burden is on a State to prove that it has dismantled its previously *de jure* segregated school system. *Fordice*, 112 S. Ct. at 2741; *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955). This burden is not satisfied by adoption of race-neutral policies when practices traceable to prior illegal discrimination have continuing segregative effects.

As the district court below recognized, this Court has created "aggressive affirmative duties in the area of primary and secondary school desegregation * * * and a presumption that the effects of the [previously unconstitutional] segregation continue until a court finds otherwise." Pet. App. 89a-90a, citing *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Board of Education* v. *Dowell*, 498 U.S. 237 (1991). In *Fordice*, the Court also indicated that, in determining whether current effects are related to prior unconstitutional discrimination, courts should find that they are unless it is proven otherwise. 112 S. Ct. at 2741 (rejecting district court's holding that the private plaintiffs and the United States had not established the constitutional defect of a current state policy because it "improperly shifted the burden away from the State"). The unique features of long-standing *de jure* segregation in public education, including its entrenched nature and system-wide impact, justify the presumption

that current racial disparities are traceable to formerly *de jure* segregation and the placement of the burden on a challenging party to prove otherwise. Cf. *id.* at 2745 (Thomas, J., concurring) (approving assumption that a current school policy reflects discriminatory intent if policy initially tainted and produces segregative effects).

OCR's policy similarly places upon States with a history of *de jure* segregation in their higher education system an affirmative duty under Title VI to ensure that no vestiges of those *de jure* systems continue to have a discriminatory racial effect. See Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department of Education thus has long required that a recipient of federal funds that has discriminated in the past "must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. 100.3(b)(6)(i). Following *Fordice*, the Department reaffirmed that standard and announced to States with pending Title VI evaluations that OCR will apply *Fordice* to require elimination of all vestiges of prior systemic *de jure* segregation. Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-4272 (1994).

The court of appeals' decision in this case conflicts with those principles. Instead of viewing current racial disparities as traceable to past *de jure* segregation in the absence of contrary evidence, the court instead utilized a "presumption" that action to remedy those disparities was not justified unless UMCP affirmatively proved that current conditions were traceable to its past unconstitutional discrimination. Pet. App. 6a. The court, in effect, imposed an evidentiary presumption that current racial disparities at UMCP are traceable exclusively to general societal discrimination.

The court of appeals' presumption is also inconsistent with the reasoning of the Court in both *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986)

(opinion of Powell, J.), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The Court there recognized that, where a governmental entity is attempting to remedy past discrimination and has a strong basis in evidence for doing so, the entity's remedial purpose is valid unless proven otherwise by the plaintiff. Plaintiffs challenging remedial action by a State "continue to bear the ultimate burden of persuading the court that the [government's] evidence d[oes] not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of th[at] evidence [i]s not sufficiently 'narrowly tailored.' Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the [government's] assertedly remedial action based on the statistical evidence was justified." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 278 (opinion of Powell, J.); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing the remedial action is required."); *Croson*, 488 U.S. at 509 (opinion of O'Connor, J.) (state or local entity may take action to rectify effects of discrimination within its jurisdiction, and inference of discrimination may arise from statistical disparity). Here, of course, the State's reason for acting was even stronger since it sought to remedy the effects of its own prior conduct in administering an intentionally segregated higher education system.

The court of appeals not only erred in locating the evidentiary burden in establishing the validity of a remedial purpose. It also imposed on the State a heavier burden than this Court requires to justify state affirmative action programs in circumstances not involving any demonstrated history of discrimination. In such cases, the Court has required that a State have a "strong basis in evidence" to justify the need for remedial affirmative action. See *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277 (opinion of Powell, J.). By requiring a state university with a long and undisputed history of discrimination to prove that its continuing racial identifiability and racial disparities are caused solely by its discrimination and not in any part by broader social factors, the court of appeals' decision places a much higher and virtually insurmountable burden of proof on state school systems to justify needed affirmative remedies.

The court of appeals' decision places UMCP and other formerly *de jure* segregated institutions of higher education in an untenable position. On the one hand, they have an affirmative constitutional and Title VI duty to eliminate the vestiges of prior segregation under *Fordice*. For this purpose, those vestiges are presumed to be the result of the prior unconstitutional segregation. If a college or university takes affirmative steps, however, and is challenged by a suit claiming reverse discrimination, it will be held liable unless it can prove affirmatively that the remaining vestiges of segregation were caused exclusively by the school's prior discrimination and not at all by general societal discrimination. Placing a State seeking to remedy its own prior unconstitutional discrimination in this dilemma is completely inconsistent with this Court's remedial jurisprudence. See *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in the judgment) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent em-

ployment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.").

2. The court of appeals' invalidation of UMCP's Banneker scholarship program is inconsistent with the Department of Education's administrative enforcement of Title VI in Maryland and with its application of its current and past policy which recognizes that race-based scholarships may, in some circumstances, be an appropriate part of a program designed to overcome the lingering effects of past discrimination. See Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756-8764 (1994) (policy guidance); Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department's policy guidance specifically recognizes the value of race-targeted financial aid as a student recruitment tool, particularly where an institution has a reputation as being inhospitable to minority students. 59 Fed. Reg. 8761 (1994). Scholarship programs function as an incentive to attend a particular university campus both for the recipient and also for others who may see the scholarship program as a sign that the campus is open to the type of person the program targets. Attendance incentives are especially important in higher education because many remedies that have been key components in desegregation plans for elementary and high school education systems, such as student assignment, are not practically feasible in the college or university context. See *Fordice*, 112 S. Ct. at 2744, 2745 (Thomas, J., concurring); *id.* at 2737 n.5.

Scholarships like the Banneker program can, in some circumstances, help reduce the racial identifiability of an institution in ways that cannot easily be duplicated by other means. By attracting qualified minority students to apply and enroll, helping those students to stay through graduation, contributing to a strong minority alumni base, and demonstrating that a traditionally white school is interested in minority students, the scholarships address some of the more intractable effects of past discrimination. Minority-targeted scholarships like the Banneker scholarships can also increase the level of minority achievement and recognition on campus. 59 Fed. Reg. 8762 (1994).

The court of appeals' decision also fails to recognize the legal significance of the fact that OCR, the federal agency charged with administrative enforcement of Title VI at universities, had found the Maryland system of higher education to be in violation of Title VI. OCR had devoted significant resources over a period of many years to the task of desegregating Maryland's racially segregated system of higher education. In 1985, OCR urged the State to adopt and expand "other-race" scholarship programs that, like the Banneker program, are designed to attract students to state institutions where they have traditionally been absent or underrepresented, thus decreasing the racial identifiability of those institutions.

OCR has the authority to order remedies for UMCP's past discrimination. See 42 U.S.C. 2000d-1; 34 C.F.R. 100.3(b)(6)(i) and (ii), 100.5(h). Its determination that Maryland was not in compliance with Title VI established the "governmental interest in remedying past discrimination." *Croson*, 488 U.S. at 497 (opinion of O'Connor, J.), citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("judicial, legislative, or administrative findings of constitutional or statutory violations" trigger remedial interest); see also 56 Fed. Reg. 64,549 (1991). The fact that OCR continued in its efforts to have Maryland adopt

remedial measures during the relevant period reinforces the validity of UMCP's interest.

The court of appeals' decision also undermines Title VI enforcement efforts by the Department of Justice, which has pending higher education litigation in which race-based scholarships may constitute part of an overall remedy. Race-targeted financial aid constitutes an important part of the consent decree in the United States' higher education suit against the State of Louisiana, *United States* v. *Louisiana*, No. 80-3300 (E.D. La. Nov. 14, 1994), and may be a needed component of the remedy in other pending Title VI enforcement actions in Alabama and Mississippi. The decision below interferes with federal enforcement efforts both by placing overly stringent restrictions on an effective remedial device and by penalizing a state institution that was attempting in good faith to comply with a federal mandate.

3. The court of appeals' restrictive analysis of UMCP's power to remedy discrimination made it impossible for the court to make a proper determination as to whether the Banneker program was a narrowly tailored means of achieving that goal. For example, because the court did not consider the possibility that UMCP's long-standing reputation as a "white" school contributed to its difficulty in attracting qualified black applicants, it failed to take into account the program's effectiveness in changing that perception and reducing UMCP's racial identifiability. Nor did the court recognize the importance of attracting highly qualified black students likely to succeed at UMCP and stay through graduation.

Also relevant to the narrow tailoring inquiry is the fact that the Banneker program has a minimal impact on opportunities available to other students. The program does not exclude any student from admission to UMCP and it does not unduly restrict financial aid resources available to other students. The record indicates that the one percent of UMCP's financial aid budget currently

devoted to the Banneker program would otherwise likely be allocated to other desegregation programs, rather than to other scholarships. Pet. App. 87a n.76. Ineligibility for a Banneker scholarship therefore does not impose the burden of achieving racial equality on particular individuals. Cf. *Wygant*, 476 U.S. at 282-283; see also 59 Fed. Reg. 8762 (1994). This fact weighs heavily in the determination whether UMCP's remedial program is narrowly tailored. The court of appeals also disregarded the fact that the Banneker program was not permanent, was susceptible to further refinement as the changes in 1988 evidenced, was subject to periodic review, and was flexible regarding the number of awards made annually.

* * * * *

The Court should grant review in this case in order to correct the court of appeals' erroneous application of a presumption that UMCP's remedial scholarship program was invalid. The judgment of the court of appeals should be vacated and the case remanded for a determination of the validity of the program under the correct constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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